No. 87-6571

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DETHORN GRAHAM, Petitioner

v.

M. S. CONNOR, ET AL., Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE STATE OF NORTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The State of North Carolina's interest is the effective enforcement of its own laws. The primary responsibility for law enforcement belongs to the states and not the federal government. North Carolina must be free to enforce its laws without a constitutional straitjacket which allows the federal court to second-guess every action of a state or local official. The standard proposed by the petitioner will lead to the needless injury and death of state and local officials who may face civil liability with every use of force and, therefore, may be hesitant to use it for their own protection.

North Carolina also has an interest in reducing the skyrocketing litigation costs for defending State and local officials. These costs drain limited resources from more compelling needs. The termination of meritless litigation at the earliest possible point will result in the saving of local resources.

North Carolina must be able to educated its more than 19,000 state and local law enforcement officers concerning the standard by which their conduct will be judged. North Carolina has a compelling interest in this standard being sufficiently definite so that officials will be able to avoid crossing the constitutional line.

STATEMENT

The petitioner, Dethorn Graham, a diabetic, took an insulin injection between 7:00 and 8:00 a.m., on November 12, 1984. (R p 20). He then met with friends at 8:30 a.m. and drank some whiskey. The petitioner next worked on the transmission of a car at his home until 2:00 that afternoon. He felt that he was about to have an insulin reaction when his friend, William Berry, drove up to the petitioner's home. The petitioner was dizzy and sweating when he got into the passenger's side of Mr. Berry's car. (T p 25).

Mr. Berry, upon direction of the petitioner, drove to a local convenience store in Charlotte, North Carolina. When they arrived at the store, the petitioner left the car and walked quickly into the store. There was a line of customers at the counter, so the petitioner hit the counter and walked out of the store. (T p 74).

Officer Connor, a Charlotte Police Officer, was in his patrol car at the parking lot of the convenience store when he saw the petitioner hurry into the store, approach the counter, and hurry back to Mr. Berry's car. Officer Connor was told by people near the store, "There was a crazy man inside this store." (T pp 77, 109).

Mr. Berry saw the police car behind him as he left the parking lot and asked the petitioner what he did in the store.

The petitioner replied, "nothing". After stopping the vehicle, Officer Connor asked Mr. Berry what was wrong with his friend. Mr. Berry responded he did not know, but maybe he was having a sugar reaction. (T p 78). Officer Connor then asked the petitioner what was wrong with him. The petitioner did not say anything. (T p 78). The officer requested that Mr. Berry wait until he checked with owner of the convenience store to see what had taken place.

The petitioner was sitting in the car and the last thing he remembered was thinking he was not going to sit in the car and wait for the officer to find out nothing had happened at the store. The petitioner cannot recall anything that happened from that point in time until he was handcuffed. (T pp 2-4).

Mr. Berry was still sitting behind the wheel when the petitioner jumped from the car and ran around the car twice. Officer Connor called for assistance.

Meanwhile, Mr. Berry left his car and requested Officer Connor help him because he did not know what was wrong with the petitioner. (T p 90).

Mr. Berry, who weighs approximately 280 pounds, took one arm of the petitioner and the officer took the other. They were able to get the petitioner to sit down on the sidewalk curb. (T p 90). The petitioner kept trying to kick Officer Conner by raising his feet up toward his shoulders. (T p 69).

Officer Townes, one of three responding officers, arrived and held the petitioner's feet until another officer, Officer Matos, arrived and took over. (T pp 69-70). Officer Townes asked the petitioner twice if he wanted to go the hospital and the petitioner responded, "No, I want to go home." (T pp 70-72).

A crowd gathered around the police cars and began yelling at the officers. Mr. Berry asked for some candy or orange juice. (T p 79). Another officer said to put the handcuffs on the petitioner, "there's nothing wrong with him except that he's drunk". (T p 80).

As the officers were attempting to handcuff the petitioner, he recalls trying to use his hands to get back to his wallet and telling the officers that he had some identification in his wallet.

An officer then took hold of the petitioner's head and moved it down. According to the petitioner, it was slammed down on the car. (T p 7). Although Mr. Berry, who was close by the car, never heard or saw any impact of the petitioner's head on the car. (T p 84).

According to Mr. Berry's first statement, the petitioner was kicking and struggling as the officers were trying to put him into a police car. (T p 88). While the three officers were trying to do this, Officer Connor went back to determine what information he could obtain from the convenience store clerk. After talking to the clerk, Officer Connor determined the petitioner had done nothing illegal.

Officer Connor went back to the petitioner and asked him if he wanted to go to the hospital. The petitioner indicated that all he wanted to do was go home. The petitioner was taken to his home and his handcuffs were removed. The petitioner later received medical treatment for his blood sugar condition and for a broken foot. (T p 28). The petitioner did not know at what point his foot was broken.

SUMMARY OF ARGUMENT

The standard for use of force by a law enforcement officer should be identical under a fourth, fifth, eighth, or fourteenth amendment analysis.

Not all use of force questions need be determined by the jury. An appropriate standard is not one of negligence, e.g. reasonable officer under conditions existing. Likewise, an appropriate standard does not demand a federal court or jury second-guess the officer by determining that other means requiring less force could have been used.

An appropriate standard must recognize the right of a state through its agents to use privileged force as an important governmental interest when balancing against the right of all citizens to be free from unwarranted intrusions or injury. The factors set forth in ***Johnson v. Glick***, 481 F.2d 1028 (2nd Cir.), *cert. den. sub. nom.* ***John v. Johnson***, 414 U.S. 1033, 38 L.Ed.2d 324, 94 S.Ct. 462 (1973), are not required elements of a claim. They merely focus the inquiry on this privileged use of force. They properly strike the necessary balance for all claims involving the use of excessive force. They are also the factors deemed appropriate by ten of the twelve circuits.

ARGUMENT

I. THE STANDARD APPLIED IN DETERMINING WHETHER FORCE USED BY STATE OR LOCAL OFFICIALS IS CONSTITUTIONALLY EXCESSIVE SHOULD BE IDENTICAL UNDER A FOURTH, FIFTH, EIGHTH, OR FOURTEENTH AMENDMENT ANALYSIS.

The petitioner and amici contend that the standard for determining liability for state and local officials' use of force should vary depending on what constitutional amendment the petitioner alleges was violated.

The State of North Carolina contends that when a citizen alleges a state or local official used unconstitutional force against him there should be one standard.

Petitioner in his complaint alleged a violation of his fourteenth amendment rights and 42 U.S.C. §1983. (A-5). Nowhere in his complaint does he indicate his fourth amendment rights were violated. The petitioner contends in his brief that his claim is "one generically complaining of the use of excessive force". See Argument I,B. He contends this is a fourth amendment case and liability should attach for negligence of state officials. The petitioner contends this is not a fourteenth amendment substantive due process action and therefore the ***Johnson v. Glick*** factors should not apply.

All excessive force cases which claim a constitutional violation should be judged by the objective standard set out in ***Johnson v. Glick*** and not by varying standards of liability depending on the "status" of a plaintiff as the petitioner contends.

There is no logical basis for distinguishing between an excessive force claim under the fourth amendment and placing liability on state and local officials for a simple tort standard and then applying a different standard of liability for excessive force after a person is arrested and yet another standard when the person is in custody. If the force is excessive, the physical location of the person is irrelevant.

The interest of a state in maintaining discipline or enforcing its laws and the interest of a citizen in bodily security do not vary regardless of the amendment relied upon. The inquiry should center on whether the citizen was subjected to such a degree of unwarranted force for no justifiable reason that it amounted to an abuse of governmental authority which shocks the conscience. It is only then the constitutional line has been crossed.

Too often, when analyzing a constitutional claim under §1983, the courts overlook when an officer is most likely to be injured or killed. It should be apparent that the time period from initial contact with a citizen until that person is handcuffed is the most dangerous to a law enforcement officer. Once the person is handcuffed, he presents less of a threat to the lives and safety of the public as well as to the officer. Further, when a citizen is placed in a confinement facility, he poses even less of a threat to the officers, given the security provided within the prison system.

Yet, commentators ignore this reality and claim that prior to arrest, officers should use the least amount of force in order to protect the citizen's fourth amendment right. Once the person is handcuffed, the officer is permitted to use more force under the fifth amendment. Finally, when a person is confined, even greater force can be used by officers without infringing on a citizen's eighth amendment rights. Comment, ***Excessive***

Force Claims Removing the Double Standard, 53 University of Chicago Law Review 1369 (1986). This analysis inverts the real need for force and relegates the constitution to a discussion of legal niceties and semantics.

Requiring conduct which "shocks the conscience" directs the inquiry into whether the official abused his authority thereby warranting monetary relief under federal law. Under this standard, which is objective and not subjective as the petitioner and amici contend, if the facts reveal such egregious conduct that it shocks the conscience, then a citizen should recover damages under either the fourth, fifth, eighth, or fourteenth amendments. It is only under this analysis that a constitutional violation is distinguished from a simple tort.

II. EVERY USE OF FORCE BY A STATE OFFICER MUST NOT RESULT IN A CONSTITUTIONAL QUESTION FOR A FEDERAL JURY.

The petitioner contends the appropriate standard for a constitutional excessive force claim is whether the officer used the amount of force a reasonable man would use under like circumstances. He further contends that the jury must make this determination.

This standard reduces the constitutional violation to that of simple negligence based upon the reasonable man standard. *See* ***Restatement of the Law***, Torts 2nd Ed., American Law Institute (1965) sec. 283. Such a standard will result in a "font of tort Law" being imposed on the federal courts. ***Paul v. Davis***, 424 U.S. 93, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

This standard fails to consider the fact that a state or local officer has a right and duty to use force. This privilege to use force is not recognize in a negligence or reasonable man standard. See ***Kidd v. O'Neil***, 774 F.2d 125 (4th Cir. 1985).

Even the "reasonable" search and seizure standard under a fourth amendment analysis is not a reasonable man negligence standard, but prohibits a seizure accomplished by

abusive government action. A law enforcement officer has never been held to the high standard urged by the petitioner. An officer is not required to afford the violator an equal opportunity in a struggle. The nature of the job of law enforcement requires the officer to use force that is in excess of that which is used against him. The judgment of the officer is not to be weighed on golden scales, ***State v. Fain***, 229 N.C. 644, 50 S.E.2d 904 (1948); ***Holloway v. Moser***, 193 N.C. 185, 136 S.E. 375 (1927), nor is it subject to the clarity of hindsight. ***Tennessee v. Garner***, 471 U.S. 1, 26, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (O'Connor, Justice, dissenting).

In order to prosecute state and local officials for civil rights violations, the government, as amicus curiae, advocates a standard allowing a jury to consider "the availability of less forceful means to subdue" the arrestee. (Br. p 13). Such a standard is frightening. A jury or judge will be allowed to second-guess the officer by determining the least restrictive means available were not used. This is not and must not become the standard to judge the use of force. The judgment of an officer often is made without adequate information or adequate time for reflection.

The least restrictive means as a standard elevates to new heights the policeman's unhappy lot to "choose between being charged with dereliction of duty if he does not arrest when he has probable cause and being mulcted in damages if he does." ***Pierson v. Ray***, 386 U.S. 547, 555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

The judge or jury cannot avoid second-guessing under the government's standard. That is why this Court has rejected any suggestion that a judge or jury consider whether superior alternatives were available. See ***Whitley v. Albers***, 475 U.S. 312, 322, 89 L.Ed.2d 251, 106 S.Ct. 1078 (1986).

A state or local law enforcement official must not be subjected to a jury trial each time force is used in an arrest. Under the standard advocated by the petitioner, every judgment of reasonableness must be made by the jury. The use of a "reasonable" standard this Court has characterized as "amorphous", ***Payton v. New York***, 445 U.S. 573, 600, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), without more, will result in inconsistent constitutional standards throughout the county.

For example, an officer who, for his own protection, decides to handcuff a non-resisting arrestee will be judged by the jury on whether a reasonable man under like circumstances would have used handcuffs and on the "availability of less forceful means", e.g. calling for another officer to ride with the arresting officer. Juries may reach different results.

The fallacy of the petitioner's standard is more evident when force is used against an officer who must in turn use force to overcome the resistance. The potential for hindsight and second-guessing is evident.

This Court must establish a standard that provides guidance so that lower courts can dismiss meritless claims and assure that officers will not be subjected to unnecessary litigation. The reasonable man standard does not accomplish this purpose.

III. THE FACTORS SET OUT IN *JOHNSON V. GLICK* ARE APPROPRIATE CONSIDERATIONS TO DETERMINE IF THE STATE OFFICER'S CONDUCT RISES TO THE LEVEL OF A CONSTITUTIONAL TORT.

The ***Johnson v. Glick*** factors are not elements which must be proven to succeed in a §1983 action. Instead, they are factors which focus the inquiry on the reason for the use of force. They have been adopted by the majority of circuits. See Respondent's brief ***Justice v. Dennis***, 834 F.2d 380 (4th Cir. 1987) *(en banc)* petition for cert. pending 87-1422

Excessive force claims under §1983 and the case law which they have precipitated have become confusing more because of sematics than substance. Whether a citizen claims his fourth, fifth, eighth, or fourteenth amendment rights have been violated, the issue remains the same:

> Was the conduct by the state officers so unreasonable that it amounts to an abuse of governmental authority entitling the citizen to monetary damages?

Section 1983 was not intended to make all torts of state officials federal crimes. As this Court has repeatedly warned:

> Violation of local laws does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean he is deprived of any right protected or secured by the Constitution or laws of the United States.

Screws v. United States, 325 U.S. 91, 108-09, 89 L.Ed.2d 1495, 65 S.Ct. 1031 (1945).

It is, therefore, a basic premise that not every use of force by a law enforcement officer is an abuse of governmental authority which is sufficient to be redressed under § 1983.

The second basic premise is that an officer is given the authority and, in fact, the duty to maintain order over a resisting or assaultive citizen. This premise is overlooked by the petitioner.

The factors set out by Judge Friendly in ***Johnson v. Glick*** focus attention on the distinction between the use of force that is reasonable to maintain order versus force which shocks the conscience and is unconstitutional.

NEED FOR THE FORCE

The first factor for the jury to consider in determining whether the government action was unreasonable is the need for the application of the force. The petitioner and amici agree that this is a proper consideration under either the simple tort analysis or the ***Johnson v. Glick*** analysis to determine if the force used was reasonable.

RELATIONSHIP BETWEEN THE NEED AND THE AMOUNT OF FORCE

The second factor considers the relationship between the need and the amount of force that was used. Again, this is a factor which must be considered in determining whether the force used was constitutionally reasonable. There is no disagreement between the petitioner and the respondent that this is an appropriate consideration for the factfinder.

EXTENT OF INJURY

The third factor is the extent of injury inflicted. This factor assists in distinguishes a common law tort from a constitutional violation. Every time an officer places a hand on a citizen, the citizen might dislike it, but it is not a constitutional violation. When the force applied causes injury so severe and disproportionate to the need presented, it is indicative of an abuse of power that is constitutionally prohibited. ***Justice v. Dennis, supra***.

The extent of the injury is just another factor to be considered by the factfinder in determining whether the force used was reasonable. If the force used was so unreasonable as to exceed the privilege accorded agents of the state, then there is a constitutional violation. The extent of the injury is objective evidence which indicates what amount of force was actually used. ***Whitley v. Albers, supra.*** The level of force and the resulting injury, if any, is certainly a valid consideration when deciding if there has been a constitutional violation.

GOOD FAITH VERSUS MALICIOUS USE OF FORCE

The fourth factor in ***Johnson v. Glick*** appears to be the most controversial. The petitioner takes this section of ***Johnson v. Glick*** out of context, particularly the word malice, and contends that it requires proof by the plaintiff that the officers inflicted injury with personal animosity toward him. This is incorrect.

This fourth factor merely asks the jury to consider whether the force was applied in a good-faith effort to maintain and restore discipline or maliciously and sadistically, e.g. without justification or excuse, for the very purpose of causing harm.

PRIVILEGED USE OF FORCE

The fourth factor in ***Johnson v. Glick*** is the most crucial factor for distinguishing between an officer's right to use force and a use of force which is a constitutional violation. A law enforcement official has the right, indeed the duty, to overcome resistance in order to maintain discipline. The force used must necessarily be in excess of the resistance. When the threat of civil liability or the actions of a federal court allow the law breaker to escape, the criminal justice system fails.

Although an officer has the right to use force, he is not insulated from liability. To use force for no legitimate purpose objectively indicates malice on the officer's part and is a constitutional violation.

This Court and the North Carolina courts have recognized that during the arrest of a citizen is when an officer is most likely to encounter serious injury or death. The number of state and local officials who are assaulted or murdered by citizens cannot be ignored when determining what amount of force is constitutionally reasonable.

An implicit promise of a law enforcement official is to risk injury or death in order to protect the lives and property of all of us. This promise is fulfilled on a daily basis. Last year over 60,000 officers were assaulted during the course of their duties. ***Federal Bureau of Investigation, Uniform Crime Reports of the United Stated*** (1987). In North Carolina alone, almost 5,000 officers were assaulted over the past two years. ***Crime in North Carolina, 1987; Uniform Crime Report (1987).***

These figures demonstrate the need for the legal principle that a law enforcement official is not required to exchange

blow for blow, but must over come the force of a citizen who resists or assaults him unlawfully.

As this Court addressed in ***Washington v. Chrisman***, 445 U.S.1, 7, 70 L.Ed.2d 778, 102 S.Ct. 812 (1982), one of the most dangerous situations for a state and local official is arrest:

> Every arrest must be presumed to present a risk of danger to the arresting officer.... There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious.... [A]n arresting officer's custodial authority over an arrested person does not depend upon a reviewing court's after-the-fact assessment of the particular arrest situation.... The officer's need to insure his own safety--as well as the integrity of the arrest--is compelling.

Good-faith, split-second decisions by officers should not be subject to second-guessing by a jury in the serenity of a courtroom. As Justice O'Connor stated in her dissent of ***Tennessee v. Garner***, 471 U.S. at 26,

> '[T]he clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances. A constitutional violation cannot be determined by what later appears to have been a preferable course of police action.'

MALICE

The petitioner and amici contend the word "malice" transforms the ***Johnson v. Glick*** standard from an objective standard to a subjective standard. The State of North Carolina contends this word, by definition, addresses the objective standard of whether the force used was without justification.

Malice is "the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury

or under circumstances that the law will imply an evil intent." ***Black's Law Dictionary***, Rev. (4th Ed. 1968).

The word malice is a factor which does not require an inquiry into the subjective mind of a state or local officials but rather, used in context is to determine whether an official exceeded his privileged right to use force and crossed the constitutional line.

Proof of an officer's state of mind is not subject to direct evidence. It is an objective determination based on the circumstances known to the officer at the time. Did the officer use force in a good-faith attempt to restore discipline when the citizen was assaulting or resisting him, or, did the officer use force without any excuse or justification (malice)?

Federal courts should not second-guess the amount of force used by an officer. Rather, the inquiry should be based on a determination of events which precipitated the use of force. This fourth factor will protect citizens from summary punishment at the hands of a law enforcement officer who is clothed with the authority of the state.

SUMMARY

There is no question that in a §1983 action the factfinder must balance the compelling interest of the state in enforcing law and protecting its citizens against their interest in being free from unreasonable seizures. A mere statement that the factfinder must determine if the force was "reasonable" allows the scales to be out of balance in favor of a citizen who resists or assaults an officer.

It is not the purpose of §1983 to reward in the federal courts a citizen who resists or assaults an officer.

The factors set forth in ***Johnson v. Glick*** simply provide a workable guideline for factfinders to follow which recognizes both the citizen's right to be free from excessive, unreasonable force and an officer's duty to maintain discipline and order in situations where not only his safety is threatened,

but the general public's as well. The ***Johnson*** factors taken as a whole, fairly and adequately state the legal principles involved in a §1983 action.

IV. A DIRECTED VERDICT WAS PROPER IN THIS CASE BECAUSE THERE WAS INSUFFICIENT EVIDENCE, OF ANY CONSTITUTIONAL VIOLATION BY THE RESPONDENTS.

The State of North Carolina agrees with the respondent that a directed verdict was proper in this case because viewed in the light most favorable to the petitioner the evidence in no way approaches the level of a constitutional violation.

There is no evidence by the petitioner that any particular officer caused him injury. The evidence is overwhelming that he was acting irrationally and had to be restrained by his friend and a police officer. He cannot point to any conduct by any officer which caused him injury. The fact that officers were present and he was injured is insufficient to show the necessary abuse of governmental authority to claim a constitutional violation.

The facts of this case are strikingly similar to a First Circuit case that held there was no violation of a constitutional right when officers mistakenly arrested a blind diabetic suffering an insulin reaction.

In ***Thompson v. Olson***, 798 F.2d 552 (1st Cir. 1986) *cert. den.* 480 U.S. 908, 107 S.Ct. 1354, 94 L.Ed.2d 524 (1987), a blind diabetic filed a §1983 action against police officers who arrested him under the mistaken belief he was under the influence of alcohol or drugs.

The plaintiff suffered an insulin shock reaction and refused to leave a bus when the driver requested. Three officers arrived and found the plaintiff who appeared to be asleep. When the officers attempted to rouse him, he murmured incoherently and began flailing his arms wildly. Although the

plaintiff did not have the odor of alcohol on his breath, the officers assumed he was drunk.

They restrained the plaintiff, put him on his knees, and handcuffed him. They attempted to stand him up and he collapsed on the floor. They placed him in a patrol car and as they were transporting him, he revived and said he was a diabetic coming out of insulin shock. The officer disregarded the plaintiff, stating diabetics do not come out of insulin shock. Later when they saw proof the plaintiff was a diabetic, no charges were filed.

The First Circuit found the conduct of the officers could not even remotely be described as malicious and at most was mere negligence. The court applied the ***Johnson v. Glick*** factors and held the action did not cross the constitutional line and therefore was not actionable under §1983.

Under the facts of the case at bar the action of the officers were at most mere negligence and, therefore, did not rise to the level of a constitutional violation.

CONCLUSION

The purpose for allowing monetary damages against state officials under §1983 is to discourage abuse of governmental authority. It is not to allow the jury to freely substitute their judgment for that of officials who have made a considered choice.

The concerns of law enforcement must be addressed by this Court. It is their voices which are seldom heard when considering if the force used was reasonable. When an officer fails to use adequate force to restrain a resisting or assaultive citizen, he all too often pays the price of personal injury or even death.

The reality of §1983 actions is not that a peaceful citizen is brutally beaten by a law enforcement officer. Instead, it is most often the case where a citizen resists or actually assaults an officer then turns to the federal court to claim that the level of force used against him was unncessary. The focus of

a jury in a §1983 action must be on the initial reason for the use of force. The competing interest of law enforcement and private citizens cannot be balanced so that an officer is faced with suffering injury or death on the streets of this country in order to avoid civil liability

For these reasons, the judgment of the Court of Appeals should be **AFFIRMED**.

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Brief of Amicus Curiae to the Supreme Court of the United States upon the persons indicated below by depositing copies of same in the United States mail, first class postage prepaid, addressed as follows:

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This the 3rd day of January, 1989.

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